

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TARELL ALLIANTE HOOD,

Defendant-Appellant.

UNPUBLISHED

May 24, 2012

No. 302948

Oakland Circuit Court

LC No. 2010-232390-FC

Before: RONAYNE KRAUSE, P.J., and SAAD and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of armed robbery (four counts), MCL 750.529, assault with intent to rob while armed (three counts) MCL 750.89, and first-degree home invasion, MCL 750.110(a)(2). The trial court sentenced defendant to concurrent prison terms of 10 to 20 years for the armed robbery convictions, 10 to 20 years for the assault with intent to rob while armed convictions, and 51 months to 20 years for the first-degree home invasion conviction. For the reasons set forth in this opinion, we affirm the convictions and sentences of defendant.

This appeal arises from events which occurred during the early morning hours of Friday, April 9, 2010, around 1:50 a.m., in the apartment of Giovanni Williams. Williams, a supervisor at Garden Fresh Salsa, testified that employees would receive their paychecks late on Thursday nights. Many employees would immediately cash their checks and some would then go to Williams' apartment to play music. This is what occurred during the early morning hours of April 9, 2010 when two men entered the front door of Williams' apartment wearing dark clothes, ski masks and sunglasses. One man (defendant) was described to police as large, around 6'2" and 320 pounds. The other man was described as smaller and slender, around 5'5" tall. Witnesses testified that the smaller man had an assault rifle and that both suspects were black. Immediately following entry into Williams' apartment, the two men proceeded to rob the occupants of their money, cell phones, and other valuables. At the time of the robbery, there were about eight or nine people at Williams' apartment.

Williams knew defendant from working with him at Garden Fresh Salsa for approximately five months. During that period, defendant and Williams engaged in several conversations and sometimes went out together following work. Defendant knew about the late Thursday, early Friday morning parties that Williams had because defendant attended such a

party at least once. Additionally, while working with defendant, Williams noticed that defendant's "[f]leet pointed out, east to west, like, and it was kind of, like, a side to side thing, different, it was just – it's a mannerism that stand out, you know." Williams testified that he thought the larger assailant was defendant because of the way he was walking and his size.

About a week after the incident, Williams and three of the people at his apartment during the robbery, Andrew Baril, Jonathon Moore, and Justin Tilton told Detective Colley, the officer assigned to the case, that defendant was one of the assailants. Baril stated the he was 99.99 percent certain that defendant was one of the men, but would not sign a statement because he did not want to go to court. During the interview with Detective Colley, Baril stated: "I'm going to have to get me a 12 gauge now." Baril denied making the statement, and claimed that he did not identify defendant as one of the assailants. Another person present during the robbery, Rakhan Stewart, told Detective Colley that one of the assailants could have been defendant. Baril, Stewart, and Moore testified that they recognized defendant due to the peculiar way he walked. Williams also recognized defendant based on his voice.

Detective Colley telephoned defendant on several occasions but defendant did not return the calls, he then received a telephone call from an attorney claiming that he represented defendant, he told the attorney that an arrest warrant had been issued and that defendant needed to turn himself into the authorities. Defendant then met with Detective Colley at the police station, but did not bring his attorney, so before speaking with defendant, he asked him "if he wanted [his attorney] present, before any questioning." Defendant stated that he would speak to Detective Colley without his attorney and signed a paper waiving his *Miranda*¹ rights. During the interview, defendant asked, "How in the f*** can five guys say I robbed them when the guy was wearing a mask?" At that point, Detective Colley had not mentioned the number of people involved or the use of masks.

During trial, defendant presented an alibi defense. Latisha Wilke, defendant's girlfriend, testified that she was with defendant at the time of the robbery. Russell Green, a supervisor at Garden Fresh, testified that he worked late on the night of the robbery, and then delivered defendant his last paycheck. Green testified that based on the time he delivered defendant's paycheck; defendant could not have been one of the assailants. However, Donna Jackson, a human resources employee at Garden Fresh, testified that time cards showed that Green did not actually work the hours he claimed on the night of the robbery, and had left much earlier. After instructions and deliberations, the jury convicted defendant for the crimes as charged. This appeal ensued.

Defendant first argues that the prosecution presented insufficient evidence to support his convictions. "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). Although this Court reviews the record de novo, *People v Mayhew*, 236 Mich App 112,

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

124; 600 NW2d 370 (1999), “[t]he standard of review is deferential” and this Court must draw all reasonable inferences in favor of the verdict, *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Defendant argues that the prosecution did not meet its burden to show that he was one of the assailants who committed the crimes. As with any crime, identity is an inherent element of armed robbery, assault with intent to rob, and home invasion. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). Thus, the prosecution must prove, beyond a reasonable doubt, that defendant committed the acts in question. *Id.* However, the positive identification of a defendant by witnesses is sufficient to support a conviction of a crime, and “[t]he credibility of identification testimony is a question for the trier of fact that [this Court will] not resolve anew.” *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). The prosecution may meet its burden to prove identity by presenting either direct or circumstantial evidence that establishes this element. *Nowack*, 462 Mich at 402-403.

The prosecution presented sufficient evidence to support defendant’s convictions. The prosecution presented statements from the victims, all of whom knew defendant through their daily interactions with him while he worked at Garden Fresh Salsa. They stated that they recognized defendant’s distinct gait, or way of walking. They described this characteristic to the jury, and stated that the larger man that robbed them also walked with this peculiar characteristic. They also stated that they were familiar with defendant’s voice, and they recognized defendant’s voice during the robbery. They also noted that defendant’s skin color and general size were consistent with that of the larger assailant.

The prosecution also presented circumstantial evidence that defendant committed the crime. Defendant knew where Williams lived, and knew of their Thursday night ritual, in which several Garden Fresh employees cashed their checks and went to Williams’ apartment. Thus, defendant knew that there would be a relatively large amount of cash there. In addition, defendant knew the location of the apartment, because he had been present at one of these parties before. Perhaps most revealing, defendant made statements during his interrogation that showed he knew details of the robbery which he could not have known had he not been there. The prosecution, therefore, presented sufficient evidence for a reasonable jury to convict defendant of these crimes.

Defendant claims that eyewitness testimony is generally unreliable, that none of the victims identified him immediately following the robbery, and that the jury should have believed his alibi witnesses’ testimony over the victims’ statements. However, this Court will not question the jury’s finding regarding the credibility of witnesses or the weight of the evidence. The victims stated that they knew defendant was one of the assailants, and explained that they did not tell the police immediately because they either did not want to get defendant in trouble or because they feared retribution for cooperating with the police. The prosecution, in addition, undermined defendant’s alibi witnesses’ testimony by showing that they had personal biases in favor of defendant and by presenting extraneous evidence that showed his witnesses were lying. This Court must, therefore, make all reasonable inferences in favor of the verdict and assume that the jury believed the prosecution’s evidence and discredited defendant’s witnesses.

Defendant next argues that the trial court erred in allowing the victims of the robbery to testify against defendant because they were unreliable witnesses. This Court reviews unpreserved evidentiary issues for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To avoid forfeiture, the defendant must show that: (1) error occurred; (2) it was plain error; and (3) the error affected the defendant's substantial rights by affecting the outcome of the trial. *Id.* at 763. Even when the defendant meets this burden, this Court only reverses where the defendant was actually innocent or the error seriously affected the fairness, integrity, or public reputation of the trial. *Id.* Additionally, this Court reviews constitutional issues de novo. *People v Billings*, 283 Mich App 538, 541; 770 NW2d 893 (2009).

MRE 602 provides the general rule regarding witness testimony:

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. [See also *People v Holleman*, 138 Mich App 108, 114; 358 NW2d 897 (1984).]

Thus, [t]he credibility of identification testimony is a question for the trier of fact." *Davis*, 241 Mich App at 700. "A lay witness may give opinion testimony that is rationally based on the perception of the witness and helpful to a clear understanding of his testimony or the determination of a fact in issue." MRE 701; see also *People v Dobek*, 274 Mich App 58, 77; 732 NW2d 546 (2007). Witnesses "may testify concerning physical observations and their opinions formed as a result of those observations." *People v Oliver*, 170 Mich App 38, 50; 427 NW2d 898 (1988).

The witnesses each testified that they were present at the apartment on the night of the robbery, and had personal knowledge of the events that occurred. They stated that they knew defendant, and explained their reasons for believing that he was one of the assailants. In doing so, they stated their physical observations in such a way that the jury could determine whether it believed that defendant committed the robbery. During cross-examination, defendant's attorney questioned the witnesses regarding their testimony and attempted to demonstrate to the jury that the testimony lacked merit. Because the witnesses testified based on personal knowledge, and whether to believe their testimony presented a question of fact for the jury, this argument is meritless. *People v Blackston*, 481 Mich 451, 488; 751 NW2d 408 (2008) ("Credibility is always a question for the jury")

Defendant also attempts to frame this issue as an issue regarding whether the witnesses improperly suggested to each other that defendant committed the crime. While it is true that unduly suggestive pretrial identification procedures conducted by the police may deprive a defendant of his Due Process right to a fair trial, that is not the case here. The Due Process clause applies to state actions, but not to private conduct. *People v Farrow*, 183 Mich App 436, 441; 455 NW2d 325 (1990) ("To raise a due process argument, there must be a sufficiently close nexus between the state and the challenged action so that the acts may be fairly treated as those of the state itself."). Because defendant bases this argument on his theory that the witnesses

were improperly tainted by speaking to each other, rather than police or governmental action, this claim fails.

Defendant finally argues that his trial counsel was ineffective for failing to: (1) request a pretrial hearing regarding the witnesses' testimony; (2) request that the trial court suppress Baril's statement to Detective Colley regarding his certainty that defendant robbed him and of his fear of retaliation; (3) call an expert to testify that eyewitness testimony is unreliable; and (4) move the trial court to exclude defendant's statements to Detective Colley because it was taken in violation of his Sixth Amendment right to counsel.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews findings of fact for clear error and constitutional issues de novo. *Id.* Because defendant failed to preserve the issue below, "in determining whether defendant has overcome the presumption that counsel was effective, our review is limited to the facts apparent on the lower court record." *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998).

"For a defendant to establish a claim that he was denied his state or federal constitutional right to the effective assistance of counsel, he must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To show deficient performance, the defendant must overcome the strong presumption that his defense counsel's decisions constituted sound trial strategy. *Id.* To show prejudice, the defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997). The defendant bears the burden of establishing the factual predicate for his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

"A convicted person who attacks the adequacy of the representation he received at his trial must prove his claim." *Hoag*, 460 Mich at 6. If the defendant's claim depends on facts not in the record, the defendant must make a testimonial record at the trial court level that supports his claim and excludes the view that his trial lawyer properly represented him at trial. *Id.* If the defendant fails to establish a factual basis for his claim, it must fail. *Id.* at n 5. Additionally, "the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). If the defendant actually raises a defense despite defense counsel's failure to call a witness, the defendant is not deprived of the defense, and counsel cannot be ineffective for not calling the witness. *Id.*

Defense counsel was not ineffective for failing to request a pretrial hearing regarding the witnesses' testimony against defendant. As discussed *infra*, the trial court properly allowed the witnesses to testify based on their personal knowledge and there was no constitutional reason to bar their testimony. Likewise, a witness may testify regarding the certainty of his identification. See *People v Gray*, 457 Mich 107, 115; 577 NW2d 92 (1998). In fact, a witnesses' testimony regarding his degree of certainty is relevant to determining whether that witness presents a likelihood of misidentification. *Id.* The fact that Baril stated that he was 99.99 percent sure that defendant committed the crime, supported the finding that the witnesses should be allowed to

testify. Finally, Baril's statements indicating that he feared for his safety were relevant for impeachment purposes, because Baril testified at trial that he did not know who robbed him, in direct contradiction of his prior statement to the police. Because it was not offered for improper purposes, the trial court would not have excluded this statement. Because counsel cannot be ineffective for failing to advocate a meritless position, these arguments fail. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant has failed to establish the factual predicate for his claim that his trial counsel was constitutionally ineffective for failing to call an expert witness on his behalf, and has therefore failed to show that his defense counsel's performance fell below an objective standard of reasonableness. *Hoag*, 460 Mich at 6. Defendant has not presented any record evidence to show that an expert witness would have testified on his behalf that the eyewitness testimony was unreliable in this case. Defendant merely cites to journal articles generally discussing the reliability of eyewitness testimony. He has not shown that, under the circumstances, any expert would have testified that the witnesses, all of whom knew defendant's voice and peculiar manner of walking, presented unreliable testimony. Defendant's failure to establish this factual predicate is fatal to his ineffective assistance of counsel claim. *Id.*

Additionally, this claim fails because defendant has not shown that he was deprived of a substantial defense that may have changed the outcome of the case. *Dixon*, 263 Mich App at 398. Defense counsel cross-examined the prosecution's witnesses at length regarding their identification of defendant as one of the assailants. During closing arguments, defendant's defense counsel belabored the identity point. Because defendant actually presented and relied on this defense, he was not deprived of any substantial defense in this case. *Id.* at 398.

Finally, the police did not violate defendant's Sixth Amendment right to counsel because he did not unambiguously and unequivocally invoke his right to counsel. Although defendant did have his attorney call Detective Colley before surrendering, he initiated the next contact with the police by meeting with Detective Colley at the police station. The United States Supreme Court has repeatedly held that a suspect must unambiguously invoke the right to counsel before interrogations to take advantage of this right. Recently, in *Berghuis v Thompkins*, __US__, __; 130 S Ct 2250, 2259-2260; 176 L Ed 2d 1098 (2010) the United States Supreme Court stated: "If an accused makes a statement concerning the right to counsel 'that is ambiguous or equivocal' or makes no statement, the police are not required to end the interrogation" and need not even "ask questions to clarify whether the accused wants to invoke his or her *Miranda* rights." *Id.* In this case, defendant had his attorney call Detective Colley to inquire about the letter notifying defendant that a warrant had been issued for his arrest. He then showed up to the station without his counsel. Considering the totality of the circumstances, defendant's actions were, at most, ambiguous regarding whether he was invoking his right to counsel. Consequently, we cannot find a violation of defendant's Sixth Amendment rights and defendant's trial counsel cannot be found to have been ineffective for failing to raise a meritless issue.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Henry William Saad
/s/ Stephen L. Borrello